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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 338690-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PATRICIA JONSON,

Appellant,

vs.

SEARS, ROEBUCK & CO., a New York for profit corporation,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE..... 2

III. ARGUMENT..... 3

 A. Standard of Review on Summary Judgment..... 3

 B. An Ottoman in a Shoe Store is Not a Dangerous Condition..... 6

 C. Even if the Ottoman Constituted a Dangerous Condition, Ms. Jonson Presents No Evidence that Sears Had Any Actual or Constructive Knowledge of Such Dangerous Condition..... 10

 D. Even if the Court Finds the Ottoman Posed a Dangerous Condition, Ms. Jonson’s Claim Fails Because Such Condition was Open and Obvious..... 15

 E. Whether Sears Inspected the Aisle Prior to the Alleged Fall is Irrelevant Because the Ottoman Did Not Constitute a Dangerous Condition..... 17

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Adams v. King Cnty.</i> , 164 Wn.2d 640, 192 P.3d 891 (2008).....	4
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.3d 857 (2011).....	9
<i>Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	4
<i>Brant v. Mkt. Basket Stores</i> , 72 Wn.2d 446, 433 P.2d 863 (1967).....	6, 11
<i>Carlyle v. Safeway Stores Inc.</i> , 78 Wn. App. 272, 896 P.2d 750 (2003).....	13, 14
<i>Charlton v. Toys "R" Us – Del., Inc.</i> , 158 Wn. App. 906, 246 P.3d 199 (2010).....	12
<i>Eakins v. Huber</i> , 154 Wn. App. 592, 225 P.3d 1041 (2010).....	3
<i>Elcon Constr., Inc. v. E. Wash. Univ.</i> , 174 Wn.2d 157, 273 P.3d 965 (2012).....	3, 10
<i>Fredrickson v. Bertolino's Tacoma, Inc.</i> , 131 Wn. App. 183, 127 P.3d 5 (2005), <i>review den.</i> , 157 Wn.2d 1026 (2006).....	6
<i>Guile v. Ballard Cmty. Hosp.</i> , 70 Wn. App. 18, 851 P.2d 689, <i>rev. den.</i> , 122 Wn.2d 1010 (1993).....	3, 4
<i>Hansen v. Wash. Natural Gas Co.</i> , 95 Wn.2d 773, 632 P.2d 504 (1981).....	6, 11

<i>Holmes v. Wallace</i> , 84 Wn. App. 156, 926 P.2d 339 (1996)	8
<i>Hymas v. UAP Distribution, Inc.</i> , 167 Wn. App. 136, 272 P.3d 889 (2012), <i>rev. den.</i> , 175 Wn.2d 1006 (2012).....	4, 16
<i>In re Per. Restraint of Morris</i> , 176 Wn.2d 157, 288 P.3d 1140 (2012).....	7
<i>Ingersoll v. DeBartolo, Inc.</i> , 123 Wn.2d 649, 869 P.2d 1014 (1994).....	10, 12
<i>Iwai v. State</i> , 129 Wn.2d 84, 915 P.2d 1089 (1996).....	5
<i>Kamla v. Space Need Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002).....	16
<i>Lakey v. Puget Sound Energy</i> , 176 Wn.2d 909, 296 P.3d 860 (2013).....	7, 9
<i>Las v. Yellow Front Stores</i> , 66 Wn. App. 196, 831 P.2d 744 (1992).....	6, 7, 12
<i>Little v. Countrywood Homes, Inc.</i> , 132 Wn. App. 777, 133 P.3d 944 (2006).....	5
<i>McDonald v. Cove to Clover</i> , 180 Wn. App. 1, 321 P.3d 259 (2014)	15
<i>Mejia v. Erwin</i> , 45 Wn. App. 700 (1986)	5
<i>Pimental v. Roundup Co.</i> , 100 Wn.2d 39, 666 P.2d 888 (1983).....	12
<i>Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	7
<i>Retired Public Employees Counsel of WA v. Charles</i> , 148 Wn.2d 602, 612, 62 P.3d 470 (2003)	17

<i>Seybold v. Neu</i> , 105 Wn. App. 666, 19 P.3d 1068 (2001).....	4, 17
<i>Smith v. Manning's, Inc.</i> , 13 Wn.2d 573, 126 P.2d 44 (1942).....	10
<i>Smith v. Safeco Insurance Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	3
<i>State v. Groth</i> , 163 Wn. App. 548, 261 P.3d 183 (2011), <i>rev. den.</i> , 173 Wn.2d 1026 (2012).....	8
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	9
<i>Suriano v. Sears, Roebuck & Co.</i> , 117 Wn. App. 819, 72 P.3d 1097 (2003).....	16
<i>Wiltse v. Albertson's Inc.</i> , 116 Wn.2d 452, 805 P.2d 793 (1991).....	12
RULES	
CR 56	3
ER 702	7
OTHER AUTHORITIES	
Restatement (Second) of Torts § 343.....	6, 15

I. INTRODUCTION

This is a case about an individual, Patricia Jonson (“Ms. Jonson”), falling over an ottoman appropriately positioned in the shoe department at Sears & Roebuck Company (“Sears”). Ottomans are, of course, common in shoe departments as they allow a customer to sit down and try on the shoes instead of attempting to try them on by uncomfortably standing or leaning against a wall. Nevertheless, Ms. Jonson brought a negligence suit against Sears for injuries she allegedly sustained from the fall. Not surprisingly, the trial court granted Sears’ summary judgment motion.

The trial court granted summary judgment without comment. Ms. Jonson frames the issues on appeal as errors in the trial court’s findings that (1) no issue of fact existed as to whether the ottoman established a dangerous or hazardous condition; and (2) the existence of the ottoman was open and obvious. The basis for Sears’ motion and presumably the trial court’s finding is that Sears did not breach a duty of care to Ms. Johnson. No reasonable person would find that the ottoman created a dangerous or hazardous condition, and, even if he or she did, Sears had no notice of a dangerous condition. Additionally, as evidenced by the photographs submitted below, any danger created by the ottoman in the shoe department was open and obvious. This Court should affirm the trial court’s order of dismissal.

II. STATEMENT OF THE CASE

Ms. Johnson allegedly tripped over an ottoman in the shoe department while shopping for shoes at the Sears store in Kennewick, Washington, on January 10, 2012. CP 2. Ms. Jonson never filled out an incident report, never asked to talk to the manager, and never requested medical assistance. CP 39-40. Instead, she continued about her day and tried on the shoes she had come to Sears for. CP 39. Two days after the accident, Ms. Jonson went to a previously scheduled annual check-up with her primary care physician and told her doctor that she fell because she was not looking where she was going. CP 42, 45.

Nearly three years later, on November 6, 2014, Ms. Jonson filed a personal injury action against Sears, alleging Sears was negligent and that the presence of the ottoman was a dangerous condition that Sears should have known about. CP 1-3. After discovery, Sears moved for summary judgment because Ms. Jonson could not establish that the presence of an ottoman in the shoe department created a dangerous condition or that Sears breached a duty of care it owed to her. CP 4. On October 16, 2015, the Honorable Vic L. Vanderschoor agreed with Sears and granted its summary judgment motion. RP 11; CP 108-109. Ms. Jonson now appeals and argues that the trial court erred in two ways. First, she argues that a question of fact exists as to whether the ottoman constituted a dangerous

condition. Second, she claims the ottoman was not open and obvious. Both her assignments of error fail.

III. ARGUMENT

A. Standard of Review on Summary Judgment.

The standard of review of the summary judgment order which is the subject of this appeal is *de novo*, and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003). The purpose of a summary judgment motion is to avoid an unnecessary trial. *Eakins v. Huber*, 154 Wn. App. 592, 598, 225 P.3d 1041 (2010).

A party may seek summary judgment in two ways. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689, *rev. den.*, 122 Wn.2d 1010 (1993). First, the moving party may argue there are no issues of material fact. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012). Once the moving party meets its burden of showing no genuine issue of material fact exists, the burden shifts to the nonmoving party, who “must set forth specific facts rebutting the moving party’s contentions.” *Id.* If, after reviewing all the facts in the light most favorable to the nonmoving party, the court concludes no issue of fact exists, the moving party is entitled to summary judgment as a matter of law. *See* CR 56.

Alternatively, the moving party may meet its burden under summary judgment by demonstrating that the nonmoving party lacks sufficient evidence to support its case. *Guile*, 70 Wn. App. at 21. If the nonmoving party then fails to present sufficient evidence supporting the elements of his claim, summary judgment is warranted. *Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If a defendant chooses to move for summary judgment under this alternative, the requirement of setting forth specific facts does not apply because “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Seybold v. Neu*, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). A nonmoving party cannot defeat summary judgment by relying on mere speculation or argumentative assertions. *Adams v. King Cnty.*, 164 Wn.2d 640, 647, 192 P.3d 891 (2008).

Like all negligence actions, premises liability requires evidence demonstrating the following: (1) the existence of a duty, (2) a breach of that duty, (3) a resulting injury, and (4) proximate cause. *Hymas v. UAP Distribution, Inc.*, 167 Wn. App. 136, 150, 272 P.3d 889 (2012), *rev. den.*, 175 Wn.2d 1006 (2012) (affirming summary judgment in favor of the

landowner where the plaintiff failed to present evidence demonstrating a genuine issue of breach of duty); *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944 (2006) (affirming summary judgment in a premises liability action where the plaintiff could not prove proximate cause). Whether a defendant breached a duty owed to an entrant can be determined as a matter of law. *Mejia v. Erwin*, 45 Wn. App. 700, 705 (1986).

A possessor is liable for harm to business invitees if it (1) knows of, or by the exercise of reasonable care would discover, a condition presenting an unreasonable risk of harm; (2) should expect that invitees would not discover the danger or would fail to protect themselves from it; and (3) fails to exercise reasonable care to protect invitees against the danger. *Iwai v. State*, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996).

Sears is not liable because (1) the ottoman did not constitute a dangerous condition; (2) Sears had no actual or constructive knowledge of any dangerous condition; and (3) even if a dangerous condition did exist, such condition was open and obvious. Ms. Jonson has not demonstrated any evidence supporting otherwise, and instead bases her claim wholly on speculation. Because Ms. Jonson cannot demonstrate any material issues of fact and fails to put forth any evidence supporting her claim, the trial court did not err in granting Sears summary judgment.

B. An Ottoman in a Shoe Store is Not a Dangerous Condition.

Ms. Jonson must first establish as a threshold matter that “a dangerous condition caused the injury.” *Las v. Yellow Front Stores*, 66 Wn. App. 196, 200, 831 P.2d 744 (1992) (citing to *Pimental v. Roundup Co.*, 100 Wn.2d 39, 666 P.2d 888 (1983)). Something more than an alleged trip and fall is required to establish the existence of a dangerous condition or hazard. *Brant v. Mkt. Basket Stores*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967); *see also Hansen v. Wash. Natural Gas Co.*, 95 Wn.2d 773, 778, 632 P.2d 504 (1981) (“The fact of injury is not, of course, sufficient to prove a dangerous condition.”). A dangerous condition exists if the condition presents an unreasonable risk of harm to the customer. *See Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 190, 127 P.3d 5 (2005), *rev. den.*, 157 Wn.2d 1026 (2006). Under the standard set by Restatement (Second) of Torts § 343, a landowner's duty attaches only if the landowner “knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk....”

Ms. Jonson cannot establish as a threshold matter that the ottoman constituted a dangerous condition. Her “evidence” is based on her own speculation. Common sense dictates that the ottoman does not constitute a

dangerous condition, and Ms. Jonson speculating otherwise does not suffice. *See Las*, 66 Wn. App. at 201.

In an attempt to save her claim, Ms. Jonson found “expert” Joellen Gill with the hopes that she could raise an issue of fact as to whether the ottoman constituted a dangerous condition. Pursuant to ER 104(a) and ER 701-703, an expert witness must have an adequate foundation for her opinions before a Court should consider such opinions. Expert testimony must be based on facts and data – not speculation. *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703 (1994). Conclusory or speculative opinions lacking an adequate foundation will not be admitted. *Id.* Unreliable expert testimony is excluded. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). ER 702 provides when expert testimony may be considered:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Id. Thus, expert testimony is admissible if (1) the witness qualifies as an expert, (2) the opinion will be helpful to the trier of fact, and (3) the opinion is based upon an explanatory theory generally recognized in the scientific community. *In re Per. Restraint of Morris*, 176 Wn.2d 157,

168-69, 288 P.3d 1140 (2012). Ms. Gill satisfies none of these elements; instead, she endeavors to act as another juror.

First, Ms. Gill does not qualify as an expert. In preparing her report, Ms. Gill only reviewed Ms. Jonson's deposition, photographs of the ottoman, and the diagram of the floor plan. CP 72. Notably, she did not conduct any field work – she did not interview any other witnesses, did not visit the Sears' store in which Ms. Jonson allegedly fell, did not inspect the ottoman at issue, did not recreate the alleged accident, and did not conduct a single experiment or test. Nor did she rely on any peer reviewed research or published sources. And she certainly did not follow any documented methodology. *Id.* Because Ms. Gill does not qualify as an expert, the Court should exclude her opinions. *See Holmes v. Wallace*, 84 Wn. App. 156, 165, 926 P.2d 339 (1996) (excluding any expert testimony based on “causal observations” that were not made on same day or under same conditions as the actual accident).

Second, Ms. Gill's opinions are not helpful to any jury. Expert testimony is only “helpful” if it concerns matters beyond the average layperson's common knowledge. *State v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183 (2011), *rev. den.*, 173 Wn.2d 1026 (2012). Again, Ms. Gill formulated her opinion by reviewing Ms. Jonson's deposition, photographs of the ottoman, and a diagram of Sears' floor plan – all

without relying on any scientific methodology. This is exactly what juries are tasked to do. Ms. Gill is not permitted to act as another juror.

And third, Ms. Gill's opinions are not based upon any theory generally recognized in the scientific community. Washington follows the *Frye* test – *i.e.*, underlying scientific theory and techniques, experiments, or studies utilizing that theory must be generally accepted and capable of producing reliable results. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P.3d 857 (2011); *see also State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994) (an expert must be able to demonstrate that the methodology used in rendering an opinion is generally accepted within the scientific community). The *Frye* test excludes expert testimony based on novel scientific methodology until there is a consensus in the relevant scientific community that the methodology is reliable. *Lakey*, 176 Wn.2d at 918-19. The standards Ms. Gill relies on are only applicable to walkway surfaces and stairs – not to objects on a walkway's surface.¹ It goes without saying that the standards Ms. Gill utilizes have no relevance here.

¹ The standards she relies on are American Society of Testing and Material's ("ASTM") F-1637-95, which discusses walkway surfaces; Woodson's 1973 "Handbook of Human Factors," which discusses stairs; the National Bureau of Standards ("NBS") 1979 "Guidelines for Stair Safety"; and Dr. Rosen's 1983 "The Slip and Fall Handbook," which also pertains to stairs. CP 80-84.

Accordingly, Ms. Gill's opinions and report are inadmissible. What is left is Ms. Jonson's pure speculation that the ottoman posed a dangerous condition. Such speculation does not survive summary judgment. *See Elcon Constr., Inc.*, 174 Wn.2d at 169 ("Conclusory statements and speculation will not preclude a grant of summary judgment.") This Court should affirm the trial court's dismissal.

C. Even if the Ottoman Constituted a Dangerous Condition, Ms. Jonson Presents No Evidence that Sears Had Any Actual or Constructive Knowledge of Such Dangerous Condition.

For a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). Constructive notice arises where the hazardous condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Id.* at 580. The plaintiff bears the burden of establishing that the defendant "had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger. *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014, 1015 (1994).

If the Court concludes that the ottoman constituted a dangerous condition, Ms. Jonson must establish that Sears had, or should have had, knowledge of the dangerous condition in time to remedy the situation or to warn her of the danger before the alleged injury. *See Brant*, 72 Wn.2d at 451–52. Ms. Jonson has presented no evidence that Sears had either actual or constructive notice that the ottoman in Ms. Jonson’s walkway was dangerous.

Matthew Teal, Asset and Profit Protection Manager for the Sears Kennewick store, reviewed the claims files stemming from injuries that have occurred at the store. CP 102-103. Claim files exist from 2005 to the present. CP 100. According to the records, *there has never been any claim of injury in the shoe department at the Sears store*, for tripping over an ottoman or otherwise. CP 102-103. And Ms. Jonson has not demonstrated that there is anything inherently dangerous about providing something to sit on while trying on shoes in a shoe department. The evidence that Ms. Jonson was distracted and tripped when she walked into the ottoman is not sufficient to establish that the condition alleged is inherently or foreseeably dangerous. CP 70; *see also Hansen*, 95 Wn.2d at 778.

Ms. Jonson claims she does not need to present evidence that Sears had either actual or constructive notice of the ottoman because Sears is a

self-service establishment. Such an exception to proving notice, commonly referred to as the *Pimental* exception, only exists “when the nature of the proprietor's business and his methods of operation are such that the existence of unsafe conditions on the premises is reasonably foreseeable.” *Pimentel v. Roundup Co.*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983). The court may decide as a matter of law whether the *Pimental* exception applies. *Charlton v. Toys “R” Us – Del., Inc.*, 158 Wn. App. 906, 918, 246 P.3d 199 (2010) (citing *Wiltse v. Albertson’s Inc.*, 116 Wn.2d 452, 460-61, 805 P.2d 793 (1991)).

The *Pimentel* exception is limited. It *only* applies “if the unsafe condition causing the injury is ‘continuous or foreseeably inherent in the nature of the business or mode of operation.’” *Ingersoll*, 123 Wn.2d at 653–54 (quoting *Wiltse*, 116 Wn.2d at 461). In other words, a relation must exist “between the hazardous condition and the self-service mode of operation of the business.” *Charlton*, 158 Wn. App. at 917 (quoting *Ingersoll*, 123 Wn.2d at 654). The *Pimental* exception “does not create strict liability or shift the burden of proof when the defendant is the operator of a self-service operation.” *Las*, 66 Wn. App. at 200. In addition, even if the *Pimental* exception applies, the plaintiff must still prove that the defendant failed to take reasonable care to prevent the injury. *Wiltse*, 116 Wn.2d at 460-61.

The *Pimental* exception is inapplicable here. The ottoman that allegedly caused Ms. Jonson's injury is not continuous or foreseeably inherent to the self-service mode of operation in the shoe department. Ottomans are a fixture commonly used in shoe stores, stores that are entirely service operated.

This Courts' decision in *Carlyle v. Safeway Stores Inc.*, 78 Wn. App. 272, 896 P.2d 750 (2003) is instructive. In *Carlyle*, the plaintiff was in the coffee section of Safeway when she slipped and fell on spilled shampoo. *Id.* at 274. The shampoo was stocked five aisles away from the coffee section. *Id.* The trial court granted Safeway summary judgment and dismissed the complaint because the plaintiff failed to produce facts showing that (1) Safeway had actual or constructive notice of the unsafe condition; (2) the unsafe condition was reasonably foreseeable; or (3) Safeway failed to take reasonable care to prevent injury. *Id.*

This Court affirmed and found that the plaintiff interpreted the *Pimentel* exception too broadly when she argued that it created a question of fact as to whether the leaking shampoo bottle was reasonably foreseeable and whether Safeway's housekeeping procedures were adequate. *Id.* at 276. This Court explained that the exception only applies "to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation." *Id.* It "does not apply

to the entire area of a store in which the customers serve themselves[.]”
Id. at 277. The court concluded that the exception did not apply because the plaintiff failed to show that it “could reasonably be inferred that the nature of Safeway’s business and its methods of operation are such that unsafe conditions are reasonably foreseeable in the area in which she fell.”
Id. The “mere presence of a slick or slippery substance on a floor is a condition that may arise temporarily in any public place of business.” *Id.*

The same is true here. For argument’s sake, even if the ottoman was considered unsafe in this particular situation, there is nothing continuous or inherently foreseeable about it. As Mr. Teal testified, not one person has claimed injury, particularly from an ottoman, in the shoe department of the Sears Kennewick store. CP 102-103. And, like the spilled shampoo in *Carlyle*, an ottoman or another similar piece of furniture that may pose a danger is a condition that could arise temporarily in any public place of business. *See* 78 Wn. App. at 277.

Under Ms. Jonson’s interpretation of the *Pimentel* exception, any complaint arising out of an accident in a self-service establishment would survive summary judgment. *See Carlyle*, 78 Wn. App. at 277. This is “clearly contrary to the narrow interpretation adopted by the Supreme Court in *Pimental*, *Wiltse*, and *Ingersoll*.” *Id.*

Even if this Court were to find that the *Pimentel* exception somehow applied, Ms. Jonson cannot establish that Sears failed to take reasonable care to prevent the injury. *Wiltse*, 116 Wn.2d at 460-61. Sears regularly inspected the shoe department during hours of operation, and those inspections were conducted by management as well as store associates. Ms. Jonson offers no rebuttal evidence but asks this Court to find that such inspections were somehow inadequate. There is simply no basis for such a finding.

D. Even if the Ottoman Posed a Dangerous Condition, Ms. Jonson's Claim Fails Because Such Condition was Open and Obvious.

Assuming a dangerous condition existed in the Sears shoe department, Ms. Jonson's claim still fails on summary judgment. Ms. Jonson asserts she acted reasonably, but the evidence demonstrates otherwise. The Restatement defines an invitee's duty as follows:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose *danger is known or obvious* to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

RESTATEMENT (SECOND) OF TORTS § 343A (emphasis added). Generally, a landowner is not liable to an invitee for dangers which are obvious. *McDonald v. Cove to Clover*, 180 Wn. App. 1, 5, 321 P.3d 259 (2014) (affirming summary judgment because the plaintiff knew of the obvious

dangers posed by the wet grass and failed to protect himself against it); *Suriano v. Sears, Roebuck & Co.*, 117 Wn. App. 819, 831, 72 P.3d 1097 (2003) (holding a store owner has no duty to protect an invitee from open and obvious hazards).

Entrants have a heightened duty to protect themselves, and courts routinely grant summary judgment when an invitee fails to take caution against an open and obvious hazard. *See, e.g., Kamla v. Space Need Corp.*, 147 Wn.2d 114, 126, 52 P.3d 472 (2002) (holding defendant had no reason to anticipate the plaintiff would drag his safety line across an open elevator shaft when the danger was obvious); *see also Hymas*, 167 Wn. App. at 150 (holding defendant could not have anticipated the plaintiff would fall into an open trench). It should be no different here.

The ottoman was in plain view in an area where any reasonable person would expect to find a seat. Such a seat is nothing out of the ordinary, and in fact is expected in a shoe department. *See Suriano*, 117 Wn. App. at 826-27. How else would one try on shoes? And Ms. Jonson herself, when asked whether stores always have ottomans in the shoe department, responded, “I could say that most stores do have them....” CP 40. Simply put, the ottoman was open and obvious.²

² As previously stated, Sears could not anticipate any harm resulting from the ottoman, especially given that Sears’ Asset and Profit Protection Manager testified that not one

E. Whether Sears Inspected the Aisle Prior to the Alleged Fall is Irrelevant Because the Ottoman Did Not Constitute a Dangerous Condition.

Ms. Jonson hangs her hat on the fact that Sears has not produced any evidence demonstrating that it inspected or prevented the ottoman on the day that she allegedly fell. CP 50; Appellant's Brief, pgs. 9-10. Given that commonsense directs that an ottoman appropriately placed in a shoe store is not a dangerous condition, the issue of whether Sears inspected for the ottoman is neither here nor there.³ Sears is not required to produce supplemental evidence demonstrating it inspected the store because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *See Seybold*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). As noted above, Ms. Jonson offers no proof regarding Sears' failure to adequately inspect but rather concludes any inspections, even if they occurred, were inadequate. Speculation or argumentative assertions that unresolved factual issues remain are insufficient to defeat a motion for summary judgment. *Retired Public Employees Counsel of WA v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003).

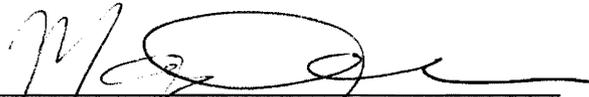
person has claimed injury in the shoe department of the Sears Kennewick store. CP 102-103.

³ With that said, Sears' premises are inspected prior to opening and during public hours on an on-going basis by store management, loss control and floor associates. CP 63.

IV. CONCLUSION

For the reasons set forth above, Sears requests the Court affirm the trial court's order of dismissal.

RESPECTFULLY SUBMITTED this 22nd day of February, 2016.



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CERTIFICATE OF SERVICE

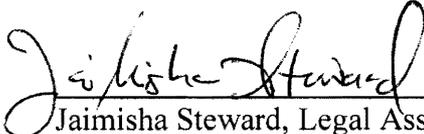
I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of February, 2016, I caused a true and correct copy of the forgoing document, "BRIEF OF RESPONDENT," to be delivered to the following counsel of record as indicated:

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Dated this 22nd day of February, 2016, at Seattle, Washington.



Jaimisha Steward, Legal Assistant